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CHARLES ELMORE

No. 477

Supreme Court of the United States.

ON CERTIORARI.

No. 445—October Term, 1929.

BARKER PAINTING COMPANY,

Petitioner,

—against—

LOCAL NO. 734, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPER HANGERS OF AMERICA; BROTHERHOOD OF PAINTERS, DECORATORS AND PAPER HANGERS OF AMERICA; GEORGE W. HOFFMAN and HARRY S. WARREN,

Respondents.

BRIEF OF RESPONDENTS.

MORRIS HILLQUIT,
Solicitor for Respondents.

THE COURT PRESS—Law Printers—47 West Street—Bowling Green 2820-1-4

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Supreme Court of the United States.

ON CERTIORARI.

No. 447—October Term, 1929.

BARKER PAINTING COMPANY,

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—against—

LOCAL NO. 734, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPER HANGERS OF AMERICA; BROTHERHOOD OF PAINTERS, DECORATORS AND PAPER HANGERS OF AMERICA; GEORGE W. HOFFMAN and HARRY S. WARREN,

Respondents.

BRIEF OF RESPONDENTS.

(Italics are mine except where otherwise noted. The references to pages relate to the printed transcript of the record.)

Statement.

This case comes before the Court on certiorari granted December 9, 1929, to review a decree of the United States Circuit Court of Appeals for the Third Circuit, affirming a decree of the United States District Court for the District of New Jersey.

The Facts.

The facts in the case are substantially as follows:

The respondent, Brotherhood of Painters, Decorators and Paper Hangers of America, hereinafter designated as the Brotherhood, is a national labor union composed of workers in the various branches of the painting and paper hanging industry, about one hundred thousand (100,000) in number, divided into approximately one thousand two hundred and fifty (1,250) local unions in all parts of the United States and Canada (p. 101).

Local No. 734 is one of such local unions of the Brotherhood and represents the organized painters of Somerville, in the State of New Jersey.

The respondent George W. Hoffman is the business agent of a labor organization which includes Local No. 734, and the respondent Harry S. Warren is an organizer of the Brotherhood.

The Brotherhood as such does not fix the wage scales of its members nor does it enter into agreements with employers or associations of employers. These functions are left exclusively to the local unions (p. 107). The functions of the Brotherhood are confined to matters of general and common interest to all members of the organization. For that purpose, the Brotherhood has adopted a constitution consisting of rules of a general character applicable to all its members and subordinate organizations. All proposed amendments to the constitution must be submitted to the whole body of the membership and be ratified by a vote of the majority of such members before acquiring validity.

In the convention of the Brotherhood held at Dallas, Texas, in the month of September, 1921, certain amend-

ments to the constitution were proposed and subsequently ratified by the membership, which amendments were thereafter incorporated in the constitution as Sections 132 and 133, and read as follows:

"Sec. 132. Neither the General Executive Board nor any other authority shall have power to grant exclusive or special privileges to any local union or district council working under a charter of this Brotherhood; nor shall the G. E. B. or any other authority be invested with power to force any employer to bring men from one city to work in another city if union men can be procured in such city where the work is to be erected and finished. All conditions of such localities shall be strictly adhered to, the shorter work day and the higher scale of either locality to prevail in all cases. A card fully paid up, regardless of where it is issued, shall entitle the holder to the right to work in any city provided he conforms with the working rules and conditions of the locality and that no strike or lockout exists in that locality.

"When a contractor, builder or boss painter does any work pertaining to our trade outside his home city or town—and in a locality where a District Council or a Local Union exists—not less than fifty (50) per cent. of the men in such district shall be employed on all work coming within the jurisdiction of the Brotherhood of Painters, Decorators and Paperhangers of America as defined in the General Constitution.

"Sec. 133. A member leaving the jurisdiction of the local union in which he is a member to work for his employer on a job in the jurisdiction of another local union must comply with the work-

ing rules and laws of that locality and demand in all cases the shorter work day and the higher scale" (Plaintiff's Exhibit 2, pp. 147, 148).

The petitioner in its brief herein does not quote the foregoing provisions of the Brotherhood Constitution but relies instead on an alleged rule of the Brotherhood worded as follows:

> "Where there is a difference between the wage scale of two cities all members employed upon a job done in one of the two cities by an employer from the other (whether sent from the city in which the employer's place of business is situated or hired in the city where the work is done) shall receive the higher of the two wage scales."

The petitioner is in error when it asserts that the rule in the language quoted by it represents the amendment adopted at the convention of the Brotherhood in 1921.

There is nothing in the record to show that the amendment adopted by the said convention was formulated in the language used by the petitioner in its brief. On the contrary, it appears clearly that the rule as definitely phrased and adopted at the Dallas Convention of the Brotherhood in 1921, was expressed in Sections 132 and 133 of the Brotherhood Constitution above quoted (Plaintiff's Exhibit No. 2, pp. 147, 148).

The petitioner's reference to the pleadings do not justify the formulation of the rule in the language used by it, since such pleadings do not purport to contain a verbatim quotation of the rule but merely a statement of its substance and effect.

The language quoted by the petitioner was in all

likelihood taken from an earlier constitution of the Brotherhood, which was revised and amplified to read as above set forth in Sections 132 and 133, and such formulation of the rule was in force and effect at the time the controversy between the parties hereto arose.

The difference between the two versions is not very material in substance, but the respondents believe it proper that the Court have before it the exact language of the Brotherhood Constitution around which the whole issue in the case revolves.

The Barker Painting Company (complainant below and petitioner here) is a New York corporation with headquarters in New York City.

On or about the 8th day of November, 1924, it entered into a contract to do the painting work of a building in process of construction in Somerville, New Jersey, known as the Somerset Hospital (Bill, par. 8).

At the time the controversy between the parties hereto arose, the prevailing scale of painters' wages in Somerville, New Jersey, was Eight ($8) Dollars per day. The prevailing wage scale in the City of New York was Ten and 50/100 ($10.50) Dollars per day.

At the time it took the contract for the Somerset Hospital the petitioner was operating under a collective agreement between the Master Painters' Association of New York, of which it was a member, and District Council No. 9, the New York organization of the Brotherhood. By the terms of this agreement the petitioner undertook to employ union labor on all its work.

It was fully aware of the provisions of the Constitution of the Brotherhood above quoted and knew that the Court of Errors and Appeals of New Jersey had upheld their validity in May, 1924, *i. e.*, six months before it

undertook the Somerville work. On two previous jobs which the petitioner did in Kearny and Newark, New Jersey, it had paid the New York rate of wages, which was higher than the local rate (pp. 45, 46).

On the Somerville job the petitioner paid its painters the local rate of Eight ($8) Dollars per day and proceeded on that basis until about 30% of the work was done.

At that point the infraction of the Brotherhood rule was called to the attention of the respondent Hoffman, business agent of Local No. 734, by the Brotherhood organizer Warren. Hoffman in turn brought the situation to the attention of the petitioner and demanded the New York rate of wages for the painters employed on the Somerville job.

Upon the petitioner's refusal to accede to the request, Hoffman informed the Brotherhood members of the petitioner's position and reminded them that under the provisions of the Brotherhood Constitution, it was their duty to demand the New York rate of wages, *i. e.,* Ten and 50/100 ($10.50) Dollars a day.

Such employees thereupon quit work on the petitioner's Somerville job (pp. 49, 51, 53, 56, 57).

There was no formal declaration of a strike, no picketing and no acts of violence or disorder.

Upon this state of facts the petitioner obtained a preliminary injunction in substance restraining the respondents from ordering, encouraging or aiding any strike or cessation of work against the petitioner.

Upon the issuance of the preliminary injunction the petitioner's employees returned to work at the local wages of $8 a day and fully completed the same before the trial of the cause and the entry of the decree dismissing the bill.

The petitioner appealed from the said decree dismissing its bill to the United States Circuit Court of Appeals for the Third Circuit. That Court, at an earlier date, had fully passed upon the precise question involved in this appeal, *i. e.*, the validity and legality of Sections 132 and 133 of the Brotherhood Constitution, in an action between this very petitioner and another branch of the Brotherhood.

Barker Painting Company v. *The Brotherhood, etc.*, 15 Fed. (2nd) 16.

Upon this appeal the Circuit Court of Appeals in substance held that the issues in the two cases were identical and that the Court would not be disposed "through the medium of this case to retry the other case and in effect reverse its decision".

Aside from this position the Court declined to pass upon the merits of the case on the ground that it presented a moot question, since the controversy had been fully disposed of by the petitioner's completing its work upon its own terms. It affirmed the decree of the District Court.

It is this decision of the Circuit Court of Appeals that is now to be reviewed by this Court.

The points raised by the petitioner upon this state of facts are enumerated in its specification of errors and are fully discussed in its brief.

In opposition to the petitioner's contentions the respondents maintain:

1. That the Circuit Court of Appeals properly declined to pass upon the merits of the case beyond reiterating its previous position in upholding the validity

of Sections 132 and 133 of the Brotherhood Constitution, for the reason that the case presented a purely moot question.

2. That the Circuit Court of Appeals properly held that its prior decision in *Barker Painting Company* v. *The Brotherhood, et al.*, 15 Fed. (2nd) 16, disposed of the merits of the controversy herein because the identical issue was involved in both cases.

3. That the Circuit Court of Appeals properly declined to modify its decision in the earlier case of *Barker Painting Company* v. *The Brotherhood, et al.*, 15 Fed. (2nd) 16, because Sections 132 and 133 of the Brotherhood Constitution are not invalid and void, and the respondents were within their rights in attempting to enforce the provisions of the said sections in their dealings with petitioner, and particularly:

A. That the rule is not unreasonable;

B. That the respondents' efforts to enforce such rule do not constitute an unlawful boycott;

C. That the respondents' efforts to enforce the said rule through organized and concerted action do not constitute an unlawful combination;

D. That the respondents' efforts to enforce the said rule do not constitute a combination in restraint of trade in violation of the Federal anti-trust laws.

4. That the construction of the New Jersey statute entitled "An Act Relative to Persons Combining and Encouraging Other Persons to Combine" (P. L. 1883, p. 36, 3 Comp. St. of N. J., p. 3051) is not involved in this

case and the decision of the Court below does not so construe the said statute as to make it offensive to the provisions of the Fourteenth Amendment.

POINT I.

The Circuit Court of Appeals properly declined to pass upon the merits of the case beyond reiterating its previous position in upholding the validity of Sections 132 and 133 of the Brotherhood Constitution, for the reason that the case presented a purely moot question.

Petitioner, a New York corporation, with its principal office in the City of New York, secured a contract to supply labor and material necessary to complete the painting upon a building erected in the Town of Somerville, Somerset County, New Jersey. The wage scale for the City of New York is $10.50 a day for eight hours' work, five days a week. The wage scale for Somerville is $8 a day for eight hours' work, five and one-half days a week. Upon petitioner's refusal to comply with the rule of the Brotherhood to pay the wage scale and observe the working conditions prescribed for the City of New York, respondents directed its men to cease work. At this time about thirty per cent. of the building had been completed. Petitioner immediately applied for and secured a preliminary injunction in effect restraining respondents' workmen from leaving the job. The preliminary injunction was obeyed; the men returned to the job and before the decision of the trial Court herein, the building had been completed at the local wage scale of $8 a day.

The controversy had thus become entirely academic and moot by the time of the appeal. Accordingly, upon this additional ground, not on the merits, the Circuit Court of Appeals affirmed the decree below. The Court said:

> "Thus it is clear the questions which the plaintiff has raised are moot because, having been saved from injury throughout the work by the preliminary injunction, it has sustained no damage by the defendants' abortive enforcement of its rules. While as a matter of fact, or, perhaps, a matter to be inferred from the averments of this bill or from their past practices, the defendants propose to continue to enforce their rules, it does not follow necessarily that they will enforce them against the plaintiff or that the plaintiff will continue in business, or that, continuing in business, it will suffer by the rules' enforcement."

Counsel for petitioner now makes the point that the Circuit Court of Appeals "misapprehended the purpose of the bill, which was aimed at a conspiracy on the part of respondents to interfere with any work of petitioner throughout the country."

A careful reading of the language of the bill of complaint as well as of the restraining clauses contained in the prayer for relief (Bill of Complaint, p. 16, par. 2) makes it perfectly clear that the bill of complaint was conceived and filed to prevent interference by respondents with the particular painting job for which petitioner had contracted on a particular building in the Town of Somerville, New Jersey. That interference has long since been removed and is not now present. Petitioner completed its work upon the building and fully

performed its contract without damage to itself. To use the language of Mr. Justice Sutherland in the case of *Brownlow* v. *Schwartz*, 261 U. S. 216, "an affirmance would ostensibly require something to be done which has already taken place; a reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this Court has declined to entertain."

It would doubtless be convenient for petitioner to secure an expression by this Court as to its probable attitude in the event of a later attempt by respondents to enforce the rules of its Constitution involved here in connection with another job which the petitioner may undertake some time in the future in some other place. But this desire for expression of opinion upon an abstract proposition is precisely what the decisions of this Court have uniformly designated as moot. Courts sit to determine particular controversies and have consistently refused to pass upon abstract propositions of law even though the course of the future action of litigants may thereby more safely be outlined. The bill of complaint alleges no threatened action on the part of respondents to enforce its rules in connection with any particular job on which petitioner is now engaged.

Counsel for petitioner states that respondents mean to enforce the rules of their Constitution. This may or may not be so. Until such intention to enforce the rules takes the form of actual interference or actual threat of interference with the work on a particular job of petitioner, this Court will not concern itself with such abstract possibilities. Counsel surely would not assert that it is the province of this Court to determine the

validity of any rule of the Union relating to wages, hours of work or other subjects, unless and until such a rule were actually put into operation in a particular case. It is a pure matter of speculation that the respondents and the petitioner will again come into actual conflict over the rules here involved.

The uniform decisions of this Court leave no doubt that the absence of a controversy makes this appeal moot. The case of *California* v. *San Pablo and Tulare R. Co.*, 149 U. S. 308, contains an excellent statement of the rule frequently referred to by later decisions of this Court. The State of California sued the defendant railroad to recover certain taxes. Pending appeal to this Court, the defendant deposited the full sum due in a bank in plaintiff's name. This Court thereupon dismissed the appeal with the following statement of the rule:

> "The duty of this Court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decision. But the Court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."

In *Brownlow* v. *Schwartz, supra,* a writ of mandamus was issued to compel a public commissioner to grant a permit to erect a building. Before the appeal came on

the permit was issued and the building erected, and the property itself transferred to other parties. This Court declined to review the case.

The case of *Mills* v. *Green,* 159 U. S. 651, involved the attempt of the plaintiff to secure the right to vote for a delegate to a state constitutional convention. Before the appeal came on, the delegates had already been elected and the convention assembled. The appeal was dismissed with the following opinion:

> "The duty of this Court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.
>
> It necessarily follows that when pending an appeal from the judgment of a lower Court, and without any fault of the defendant an event occurs which renders it impossible for this Court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the Court will not proceed to a formal judgment, but will dismiss the appeal."

In *Commercial Cable Co.* v. *Burleson,* 250 U. S. 362, the plaintiff attempted to enjoin the Post Master General from interfering with its property. Pending appeal from a decree dismissing the bill of complaint, the property was returned upon the order of the President who, by proclamation, had assumed control of the transportation company. The Court said:

> "But we are of opinion that these anticipations of possible danger afford no basis for the sug-

gestion that the cases now present any possible subject for judicial action, and hence it results that they are wholly moot and must be dismissed for that reason."

In *United States* v. *Alaska Steamship Co.*, 253 U. S. 113, the Interstate Commerce Commission had issued an order requiring new forms of bills of lading. The carriers sought to enjoin such order from going into effect. Pending appeal the matter became moot as a result of an enactment of Congress requiring certain changes in bills of lading. The carriers, nevertheless, desired this Court to pass upon the power of the Interstate Commerce Commission to prescribe changes in bills of lading. This Court refused to determine the abstract question in the absence of an actual controversy and said:

"It is true that the determination of it underlies the right of the Commission to prescribe new forms of bills of lading, but it is a settled principle in this Court that it will determine only actual matters in controversy essential to the decision of the particular case before it. Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot, and should be treated accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this Court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the Court or

in any other case, can enlarge the power, or affect the duty, of the Court in this regard. *California* v. *San Pablo and Tulare R. Co.*, 149 U. S. 308, 13 Sup. Ct. 876, 37 L. Ed. 747; *U. S.* v. *Hamburg-Amer. Line*, 239 U. S. 466, 475, 476, 36 Sup. Ct. 212, 60 L. Ed. 387, and previous cases of this Court therein cited."

In *United States* v. *Evans*, 213 U. S. 297, the Court said:

> "When the judgment appealed from cannot be affected by the decision of the Appellate Court the case becomes a moot one and the appeal should be dismissed; hearing and deciding such an appeal, for the purpose of establishing a rule of observance in cases subsequently arising, is not an exercise of judicial power."

See also:

Maloney v. *Condon*, 189 U. S. 64, 47 Sup. Ct. Rep. 709;

American Book Co. v. *Kansas*, 193 U. S. 49, 48 Sup. Ct. Rep. 613;

Southern Pacific Terminal Co. v. *I. C. C.*, 219 U. S. 498, 55 Sup. Ct. Rep. 310.

The three cases cited by petitioner in its brief, are clearly distinguishable. They did not in any way involve moot questions. In each case an actual controversy was presented.

In *Bedford Cut Stone* v. *Journeymen S. C. Assn.*, 274 U. S. 37, both a strike and lockout were in progress incidental to the attempt by the Union to enforce a rule of its constitution. . Counsel's quotation from that case

merely holds that where a concrete controversy and threats exist, equity will intervene in the particular situation to avert probable injury without waiting for the occurrence of actual injury.

The case of *Thompson Machine Co.* v. *Brown*, 89 N. J. E. 326, 328, 104 Atl. 129, involved the threat of injury during a strike which was actually in progress.

In *Vicksburg Water Works* v. *Vicksburg*, 185 U. S. 66, 82, the facts disclosed an attempt by the City of Vicksburg to deprive the plaintiff of its rights under an existing contract which it had with the City for the supply of water for the public. The City attempted to repudiate the contract and to compel the plaintiff to sell out to the City for an inadequate consideration. A resolution of the Mayor and Aldermen denied that the contract existed. The City also filed a bill in chancery alleging that the contract was null and void, and that the rates were exorbitant. The plaintiff prayed for an injunction restraining the City from assuming to abrogate the contract and from taking away its franchises and from attempting to coerce the plaintiff to sell its property for an inadequate price. Under these circumstances, the Court refused to wait until damage was actually done.

POINT II.

The Circuit Court of Appeals properly held that its prior decision in *Barker Painting Company* v. *The Brotherhood, et al.*, 15 Fed. (2nd) 16, disposed of the merits of the controversy herein because the identical issue was involved in both cases.

Petitioner, in its brief, states that the Circuit Court of Appeals declined to consider the merits of the appeal because of its prior decision in *Barker Painting Company* v. *The Brotherhood,* 15 Fed. (2nd) 16. This is not so. A reading of the opinion by Judge Woolley, writing for the Circuit Court of Appeals, discloses that the decision affirming the decree of the District Court was placed upon two grounds: First, the Court refused, in effect, to reverse its prior holding since it found no new facts in the case at bar which differentiated it from the facts in the earlier case or which raised any new question of law. This is a distinct holding upon the merits. Secondly, and, as an additional reason, complete in itself, because the controversy is now moot.

That the decision of the Circuit Court below was made upon the merits is clearly indicated by the language of the Court which we here quote at length:

> "Of course we should not be disposed, through the medium of this case, to re-try the other case and in effect reverse its decision if the two cases are based on substantially the same facts and this one, therefore, raises no new question of law or no new aspect of an old question. Realizing this, counsel for the plaintiff selected expressions

from our opinion in the Pennsylvania case in which he found an implication that we had rather summarily and without full consideration disposed of that case because on appeal from a decree merely refusing a preliminary injunction and, pointing to the difference between the two decrees —there interlocutory, here final—represented that the evidence, which in that case we said (as a caution against commitment on another state of facts) was not sufficient to invoke the extraordinary remedy of injunction, is supplied in this case by evidence which does justify such a remedy, and, thus setting up a new case, asked for a reconsideration of the law and reversal of our previous position.

We heard the argument at length. *On our study of the record we of course found the facts in this case different from those in the Pennsylvania case as to place of work, personnel, dates, etc., but similar in character and action, and found no new facts which differentiate this case from the other or raise any new question of law. The same questions run through both cases, as indeed they do in all the reported cases on the subject whether decided on interlocutory or final decree. New Jersey Painting Co.* v. *Local No. 26,* 93 N. J. E. 108; 122 Atl. 622; reversed 96 N. J. E. 632; 126 Atl. 399; *Hass, Inc.* v. *Local Union No. 17,* 300 Fed. 894; *Marshall* v. *Brotherhood, Common Pleas, Philadelphia,* not reported; *Douglas & Bros. Inc.* v. *Malette,* Superior Court, Rhode Island, not reported; *Barker Painting Co.* v. *Brotherhood,* 15 Fed. (2d) 16, certiorari denied, 273 U. S. 747; *Barker Painting Co.* v. *Brotherhood,* 23 Fed. (2d) 743, certiorari denied, 276 U. S. 631."

Thus the Circuit Court below, upon the merits, and after "study of the record" and after "hearing argument at length", and finding the facts herein similar in character and action to those involved in the Pennsylvania case, and the same questions of law, affirmed the decree herein upon the same grounds and reasoning as in the Pennsylvania case previously decided.

POINT III.

The Circuit Court of Appeals properly declined to modify its decision in the earlier case of *Barker Painting Company* v. *The Brotherhood, et al.*, 15 Fed. (2nd) 16, because Sections 132 and 133 of the Brotherhood Constitution are not invalid and void and the respondents were within their rights in attempting to enforce the provisions of the said sections in their dealings with petitioner.

A.

SECTIONS 132 AND 133 OF THE CONSTITUTION OF THE BROTHERHOOD ARE REASONABLE AND VALID AND THE STRIKE ATTEMPTED BY THE RESPONDENT LOCAL OF THE BROTHERHOOD WAS A LEGITIMATE EXERCISE OF A RIGHT CONFERRED BY LAW ON ORGANIZED WORKERS.

A union of workers is not called upon to justify a strike of its members. If such strike is claimed to be unlawful because called for an unlawful object or conducted by unlawful means, the burden of proving such unlawfulness rests upon the party asserting the same.

In *The Barker Painting Company* v. *the Brotherhood of Painters, Decorators and Paperhangers of America, et*

al. (15 Fed. (2nd) 16), the Circuit Court of Appeals for the Third Circuit has summarized the law on the subject in the following language:

> "The courts * * * re-state what is now settled law 'that employers have no vested interest in the labor of workers and their workers have a right, individually and collectively, to lay down terms on which they will sell their labor for the highest return they can obtain, and when not satisfied, they have a right to strike. So long as they do this in their own interest, not with the purpose of assailing others, and do it in a manner not in itself unlawful, the courts will not interfere'. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797; *Mayer* v. *Journeymen Stonecutters Ass'n*, 47 N. J. Eq. 531, 20 Atl. 492; *My Maryland Lodge* v. *Adt*, 100 Md. 238, 249, 59 Atl. 721; *Bossert* v. *Dhuy*, 221 N. Y. 342, 117 N. E. 582; *National Protective Ass'n* v. *Cummings*, 170 N. Y. 315, 321, 63 N. E. 369; *Toledo, etc. R. R. Co.* v. *Pennsylvania Co.*, 54 Fed. 730."

This statement of the law is in full accord with the best authorities on the subject.

In *National Protective Association* v. *Cummings*, 170 N. Y. 315, the Court of Appeals of the State of New York, in a very elaborate opinion, summarized the prevailing doctrine with respect to the right of workers to strike as follows:

> "The same rule applies to a body of men who, having organized for purposes deemed beneficial to themselves, refuse to work. Their reasons may seem inadequate to others, but if it seems to be

in their interest as members of an organization to refuse longer to work, it is their legal right to stop. The reason may no more be demanded, as a right, of the organization than of an individual, but if they elect to state the reason their right to stop work is not cut off because the reason seems inadequate or selfish to the employer or to organized society."

That the doctrines so clearly announced in *National Protective Association* v. *Cummings,* are also accepted in New Jersey is made apparent by the following excerpts from the forceful and lucid opinion of Vice-Chancellor Stevenson in *Jersey City Printing Co.* v. *Cassidy,* 63 N. J. Eq. 759:

"From an examination of the cases and a very careful consideration of the subject, I am unable to discover any right in the courts, as the law now stands, to interfere with this absolute freedom, on the part of the employer, to employ whom he will, and to cease to employ whom he will and the corresponding freedom on the part of the workman, *for any reason or no reason* to say that he will no longer be employed and the further right of the workmen of their own free will to combine, and meet as one party—as a unit—the employer, who, on the other side of the transaction, appears as a unit before them. Any discussion of the motives, purposes, or intentions of the employer in exercising his absolute right to employ or not to employ as he sees fit, or of the free combination of employees in exercising the corresponding absolute right to be employed or not as they see fit, seems to me to be in the air. * * *"

The rule is stated in Ruling Case Law, Vol. 16, page 434, in the following language:

> "The right of workmen who are not under contract, to quit singly or in a body is not now an open question. The fact that they do so by preconcerted arrangement is not material. It is likewise immaterial whether they have cause for quitting. They have the same right to quit without cause as the employer has to discharge them without cause. They need not give any reasons for their conduct. Their reasons may seem inadequate to others, but if it seems to be in their interest as members of an organization to refuse longer to work, it is their legal right to stop. The reason may no more be demanded, as a right, of the organization than of an individual."

But even upon the theory that the union is under a duty of justifying the strike, the defendants have fully met the test in this case.

The strike alleged to be conducted by them is for the purpose of enforcing the provisions in their constitution set forth in Sections 132 and 133.

The motive and object of the Brotherhood of Painters, Decorators and Paper Hangers of America in adopting the said rule are explained by the witness Joseph F. Kelley, Vice-President of the Brotherhood substantially as follows: The employing painters in the United States may be divided into two classes with respect to the scope and character of their work, to wit, local concerns, who confine their work to their own localities and national concerns, who are called upon to do work in all parts of the country. The home offices of the latter center principally in the largest cities such as New York, Chicago

and Boston. The work done by such "national" painting contractors is distinguished from that ordinarily done by local concerns qualitatively or quantitatively, *i. e.*, it is either decorative work on especially fine buildings, such as public buildings, churches, theatres, banks or expensive private residences, or work of a commercial character involving large operations, such as loft or office buildings, manufacturing plants or wholesale housing developments.

Since both of such classes of work are apt to be in great demand in the large cities and industrial centers, such places attract and develop journeymen painters of skill and efficiency above the average and their rate of wages is fixed accordingly.

In smaller towns and localities, the ordinary painting work is as a rule done by local contractors employing local workers, but when such a town requires painting work on an especially fine building or on an operation of unusual size, the work is frequently given to "national" painting contractors, *i. e.*, large concerns with a national reputation whose home office is in New York, Chicago or other large city. The "national" contractor in such case bases his charges on the labor cost in his home town, unless the local wage rate is higher, which is very rarely the case (pp. 101-110).

Since the special character of the work, which the national contractor is called on to do in small towns often requires a higher degree of skill or experience than that possessed by the local journeymen painters, the contractor as a rule sends a number of his employees into such town to do all or part of the work. Journeymen painters, particularly those of New York, Chicago and other large cities, are thus often required to travel to other parts of the country to do their work.

This custom has given rise to a complexity of problems within the industry. Local artisans complained of being displaced by painters coming from New York or other large centers to do jobs in their localities, and in order to do justice to such local workers while taking account of the special needs of the builder, the rule was established to the effect that at least one-half of the painters employed on a local job shall be workers of the locality.

Another serious problem arising from the situation concerned the terms of employment, *i. e.*, wages and hours of labor on such jobs. If we assume that a painting job is being done on a building in the State of New Jersey by an employing painter of the City of New York, and that twenty men are employed on the job, one-half of them coming from New York where the prevailing rate of wages is $10.50 per day, and the other half coming from the particular locality in New Jersey, where the prevailing wage is $8.00 per day, and the men are doing the same work, the question arises what scale is to be applied to the job. Three possibilities presented themselves to the convention of the Brotherhood in its attempt to solve the problem:

1. The payment of different wage rates to the workers engaged in the same work on the same job. This was rejected as an unjustifiable discrimination and as a practice apt to create jealousies and antagonisms among the workers and to impair the efficiency of their work as well as the integrity and morale of the organization.

2. To apply the lower wage rate, prevailing in the locality, to all workers on the job. This, too, was rejected for the reason that it would be manifestly unfair to

require, say a worker coming from New York and compelled to live away from home, to work for a smaller wage than he would receive if he had remained working at home.

3. To apply the higher scale to all workers engaged on the job. This was adopted as the most equitable solution, and one most nearly just to both classes of workers, as well as to the employer. A contracting firm of New York or other large center in undertaking a country job always figures upon the wages and cost of production prevailing in its home territory, and a country builder engaging a New York painting contractor, figures on New York costs and is prepared to pay somewhat more than he would have to pay to a local contractor.

Mr. Kelley's testimony on this phase of the question is as follows:

> "Q. Mr. Kelley, in undertaking an outside job, is it customary for the contractor to take some of his employees in his home city to such outside jobs? A. Mostly every case, yes, sir.
>
> Q. And prior to the enactment of the present constitutional provision of your Brotherhood what wages would the men so taken to the outside job be paid? A. He would get the higher rate of wages. If he was leaving his home city and it was higher he would get that, and if it was going to a city where it was higher he would have to receive the higher rates of wages there.
>
> Q. In a case where the job was undertaken by a national concern in New York to be executed say somewhere in New Jersey and some of the New York employees would be sent to said job, they would get the New York rate? A. Yes, sir.

Q. And in such cases would the men coming from New York frequently work with local men on the same job? A. Yes, sir.

Q. And prior to the enactment of this rule what wages would the local men get? A. Well, as I said before, in a number of instances the employer coming in would offer them some inducements to work for, as I said, five or ten cents an hour more or make some extra inducements to them. In a few instances they might have worked for local conditions.

Q. Within your experience as member of the general executive board and as the representative of the Brotherhood within your respective territory, did any friction ever come to your notice on account of the diversity of wages paid on the same job to men coming from one city or from the other? A. Yes, sir.

Q. Or any disputes between workers and employers on that ground? A. Yes, sir.

Q. Do you know of any strike having been caused by such conditions? A. I cannot just figure where—just now where there was any strike directly, but we have had lots of friction and it would lead us to strike if we were not to adjust them to the satisfaction of our men and the employer.

Q. Have you had many occasions to adjust such disputes? A. Yes, sir.

Q. Arising out of the diversity of wages paid on such jobs? A. Yes, sir; I have had some" (pp. 113, 114).

and again with respect to the motives that actuated the convention of the Brotherhood of Painters, Decorators

and Paperhangers of America in adopting the rule under discussion:

> "Q. I say, will you summarize briefly—state briefly the reasons which were advanced for the adoption of this amendment at your convention? A. I thought I explained those early in the affair. Of course, I said that the reasons advanced were on account of the members knowing and believing that all this work was estimated at the higher rate, and again for to keep down the friction that would exist where there were two scales of wages.
>
> Q. On the same job? A. On the same job, and by the same employer, which isn't—doesn't mean very much organization. So—in order that the job would go along smoothly and efficiently because where there was friction it generally follows that the employer is not getting what belongs to him, so far as that is concerned, and in order that there should be a just and equitable wage, because in a number of instances the men were working alongside of men and doing, in instances, the same class of work, and they believed that they were justified in their contention of getting as much money as their fellow brothers coming from the other cities. All of those were things that were discussed" (pp. 116-117).

The petitioner in its brief herein argues that there is no sufficient proof in the record to support the contention that prior to the enactment of the rule there was frequent friction between members of the organization engaged on the same job at different wages.

It is respectfully submitted that the witness Joseph F. Kelley, Vice-President of the Brotherhood, in charge of the Eastern District, and for many years in direct and

personal touch with the situation in the painting industry and particularly with the conditions and relations of the members of his own union, was fully competent to testify as to the existence of such friction and that it was entirely unnecessary and impossible to enumerate every case of such friction that had arisen among the workers in the fifteen years preceding the trial of the case.

In numerous instances also, the petitioner refers to the state of "harmony" alleged to have existed between the workers before the enactment of the rule under discussion. This, it is respectfully submitted, is a purely gratuitous assumption. There is absolutely no proof in the record of any such harmony.

The question before the Court furthermore is not whether there actually was much friction between the workers before the enactment of the rule. It is sufficient that the delegates at the Dallas convention of the Brotherhood believed in good faith that there was such friction and that the enactment of Sections 132 and 133 would tend to obviate or minimize such friction.

Whether the rule thus adopted by the Brotherhood is wise and whether it represents the best possible solution of the peculiar labor problems in the painting industry is a question upon which opinion may be divided, but it is not questioned and cannot be questioned that the rule was adopted by the members of the Brotherhood in good faith and in the belief that its enforcement would prevent unfair discrimination and destructive jealousies and rivalries among its members and result in the preservation of their standard of life without doing an injustice to the employers.

Thus viewed, it is a condition which the organized painters of this country attach to their labor in the same way as the wage scale, work hours and other

conditions upon which they are willing to perform work for employers.

The rule thus established by the Brotherhood has the triple aspect of a wage regulation, an effort to secure equitable distribution of work among its members and of a measure to preserve the integrity of the organization and harmony among its members, and it is respectfully submitted that all these are legitimate objects of trade union activity and that organized workers have a lawful right to enforce the same by strike.

The right of workers to strike to maintain or advance a rate of wages is so firmly established in law that no citation of authorities is required to support the contention. It is quite obvious that the prime object of the rule attacked herein is to establish a standard of wages. It appears from the testimony herein that the scale of wages of journeymen painters is not uniform throughout the country but varies from place to place, being determined in each case by divergent factors, such as the local cost of living, the relation between the local demand and supply of labor, the efficiency of the workers' organization, etc. One difference in the wage rates is thus based on geographical lines: a painter operating in New York, even though he may live in New Jersey, gets a higher rate of wages than if he had been working in New Jersey and *vice versa*. The rule attacked herein adds another ground of wage variation, *i. e.*, the location of the employers' home office and the possible employment by him of workers from his home city in other places. Reduced to its simplest terms, it means that a New York concern, which as a rule gets New York prices for work it undertakes in any part of the country, shall pay New York wages to its employees no matter where employed. From the workers' point of view it

means that the members of the Brotherhood of Painters, Decorators and Paper Hangers of America refuse to work for a New York concern anywhere in the United States for less than New York wages.

The right of an individual and single worker to make different conditions as to his wages to different employers depending upon the location of the work or the location of the employer can, of course, not be questioned, and it is respectfully submitted that the same right must be accorded to groups of workers acting in concert.

While it may be admitted that labor unions cannot in all cases claim the right to secure the performance or non-performance of an act "merely because a single person can do so" it obviously cannot be contended that a labor union has no right to enforce the performance of a certain condition collectively merely because a single person has such right.

The cases in which concerted action on the part of a body of workers has been held unlawful, have invariably been such in which either the object sought to be attained had no bearing on the interests of the workers or in which the methods employed were in themselves unlawful.

The case of *Jersey City Printing Co. v. Cassidy, supra*, is illuminating on this point. It was there held that defendants, members of a labor union were endeavoring by threats or persuasion to have plaintiff's employees under contract to render service, break their contract, and an injunction was granted to restrain such interference. The decision was based not on the fact that the acts complained of were those of a combination, but on the fact that the acts in themselves were un-

lawful, whether committed by a single individual or by a group acting in concert. The following excerpt from the opinion makes this evident:

> "Where defendants in combination or individually undertake to interfere with and disrupt existing contract relations between the employer and the employee, it is plain that a property right is directly invaded."

In *Roddy* v. *United Mine Workers of America*, 139 Pac. 126, 41 Okla. 621, the Court said:

> "We think under the better authority that what an individual may do, a number of his co-laborers may join him in doing, provided the thing to be done is lawful."

The same view was expressed in *National Protective Assn.* v. *Cummings*, *supra*.

> "Whatever one may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act."

In *Clemmitt* v. *Watson*, 14 Ind. App. 38, 42 N. E. 367, the Court said:

> "Each one could have quit without incurring any civil liability to him (the employer). What each one could rightfully do, certainly all could do if they so desired, especially when their concerted action was taken peaceably, without any threats, violence or attempt at intimidation."

The following extract from the opinion of Mr. Justice Taft in *Toledo etc., Co.* v. *Penn. Co.* (C. C.) 54 Fed. 730, 19 L. R. A. 387, illustrates the principle here discussed:

> "Such combinations are said to be unlawful

conspiracies, though the acts in themselves and considered singly are innocent, when the acts are done with malice, i. e., with the intention to injure another without lawful excuse."

The numerous authorities cited by petitioner in its brief do not in any way affect the rule that lawful objects are not made unlawful by the mere fact that they are being pursued by a combination.

All that these authorities show is that the attempt to establish closed shops or to force the discharge of non-union employees or to prevent the handling of non-union made material or the employment of apprentices, have been held to be unlawful objects of combinations in some jurisdictions.

The rule of the Brotherhood attacked herein is organically coupled with another rule to the effect that in all cases in which an outside employer undertakes work in any locality, he must employ at least 50% of local labor. Under the custom of awarding painting work of extraordinary quality or volume in small towns to contractors in large cities above described, the local painters are often deprived of an opportunity to do the work in their own locality. Such local painters have the undoubted right to insist upon getting all the available painting work in the industry and to strike for the enforcement of such a demand (*Pickett* v. *Walsh*, 192 Mass. 572, 78 N. E. 253; *Bossert* v. *Dhuy*, 221 New York 342) and it seems clear that such local painters have an equal right to say that they will forego a part of the available local work in favor of outside employees, provided that they are paid the same rate of wages as such outside employees. From this point of

view Sections 132 and 133 of the constitution of the Brotherhood must be considered as a measure for equitable distribution of available work among local and outside painters, coupled with a uniform wage regulation as part of such arrangement and thus comes squarely within the principle of *Minasion* v. *Osborne*, 210 Mass. 250, 96 N. E. 1036, in which the Court said:

> "The right of one person to dispose of his labor freely is not superior to the same rights in others. The right of one to work under unsanitary conditions does not go to the extent of preventing others from striking in order to secure mitigation of these conditions merely because such a strike may interfere with the desire of the first to continue to work under those conditions. The same principle applies where a distribution of work discriminates between men of average capacity and gives an undue preference to one over another in times where there is a dearth of work. A system of giving out work which under existing conditions, operates unjustly, is a condition of employment in which all men affected by it in a particular shop may have a legal interest. Nor is injury to the employer a reason why a strike to remedy such condition should be enjoined.
>
> The right of the employer is no more absolute in respect of a condition of employment like this than it is as to hours of labor or rates of wages. It is not a subject on which he is entitled to special protections against an orderly and otherwise lawful strike. *Pickett* v. *Walsh*, 192 Mass. 582. *The conduct of these defendants* • • •, *appears to have sufficient justification in the fact that it is of a kind and for a purpose, which has a direct relation on the benefits of a more uniform*

distribution of work, and thus of wages among equally skilled or competent workmen during dull seasons."

But even if the rule of the Brotherhood whose validity is attacked herein could not be upheld as a wage regulation, or as an effort to distribute all available work equitably among its members, it must be held to be valid in law and a justifiable cause for a strike as a measure to preserve the "integrity of the union."

The testimony of the witness Kelley is to the effect that the payment of varying wages to workers on the same job and the preference given to workers from other cities over local workers, often resulted in friction and disharmony among the members of the union and that the practice had a tendency to undermine the morale of the union. The rule adopted by the Brotherhood is designed to preserve the efficiency and integrity of the union. This testimony is entirely uncontradicted.

That the strike may cause incidental injury to the employer in no way affects its validity.

As stated in Corpus Juris, Vol. 12, page 570:

> "As long as the strike is for a legitimate purpose, the fact that injury results to the employer does not alter the character of the act and render it unlawful. Indeed it may readily be seen that if the quitting of the employment resulted in no injury to the employer, the object of the combination would necessarily fail."

In *National Protective Assn.* v. *Cummings, supra,* the Court said:

> "The struggle on the part of individuals to prefer themselves, and to prevent the work which

> they are fitted to do from being given to others, may be keen and may have unhappy results in individual cases; but the law is not concerned with such results, when not caused by illegal means or acts."

In *Bossert* v. *Dhuy, supra,* it was held that if a strike is conducted in good faith, to better the condition of the strikers and not to injure an employer

> "the fact that such action may result in incidental injury to the employer does not constitute a justification for issuing an injunction against such action."

Similarly it was held in *Mills* v. *U. S. Printing Co.,* 99 App. Div. 605 (N. Y.):

> "nor does the incident or private injury necessarily attendant upon execution of such general plan (a strike for more pay or better working conditions) render unlawful the general scheme."

In *National Fireproofing Company* v. *Master Builders Association,* 169 Fed. 259, the principle is set forth as follows:

> "Several laborers and builders may combine for mutual advantage and so long as the motive is not malicious the object not unlawful nor oppressive, and the means neither deceitful or fraudulent, the result is not a conspiracy, although it may necessarily work injury to other persons."

The following excerpt from the opinion of the Court in *State* v. *Stockford,* 77 Conn. 227, 58 Atl. 769, is to the same effect:

> "Workmen may lawfully combine to accom-

plish their withdrawal in a body from the service of their employers, for the purpose of obtaining an advance in wages, a reduction of the hours of labor or any other legitimate advantage, even though they may know that such action will necessarily cause injury to the business of their employers, provided such abandonment of work is not in violation of any continuing contract, and is conducted in a lawful manner, and not under such circumstances as to wantonly or maliciously inflict injury to person or property."

The Court of Appeals of Maryland thus expressed the principle (*My Maryland Lodge* v. *Adt.*, 100 Md. 238, 59 Atl. 721):

> "If ruin to the employer results from their peaceable assertion of these rights, it is a damage without a remedy."

So likewise the Supreme Court of Minnesota has declared (*Gray* v. *Building Trades Council*, 91 Minn. 171, 97 N. W. 663):

> "A strike for the purpose of securing better wages or otherwise bettering the condition of the strikers is not unlawful, though the result thereof is a combination between the striking employees and results incidentally in the injury of others. *Bohn Mfg. Co.* v. *Hollis*, 54 Minn. 224, 55 N. W. 1119."

In *Arthur* v. *Oakes*, 63 Fed. 310, the Court said:

> "Such a loss, under the circumstances stated (the quitting of work to secure wages deemed just), would be incidental to the situation, and could not be attributed to employees exercising lawful rights in orderly ways."

In *Allis-Chalmers Co.* v. *Iron Moulders Union No. 125,* 150 Fed. 155, 171, the Court recognized the action of a combination of workers to be lawful

> "So long as the combination is merely taking measures to secure its own legitimate advantage or economic advancement, although harm may incidentally result to the employer."

See also:

Karges Furniture Co. v. *Amalgamated Woodworkers' Union,* 165 Ind. 421, 75 N. E. 877.

B.

THE RESPONDENTS' EFFORTS TO ENFORCE THE PROVISIONS OF SECTIONS 132 AND 133 OF THE BROTHERHOOD CONSTITUTION DO NOT CONSTITUTE AN UNLAWFUL BOYCOTT.

The petitioner throughout its brief persists in characterizing the respondents' efforts to enforce Sections 132 and 133 of the Brotherhood Constitution as a "boycott". The facts in the case are perfectly clear and practically undisputed, and their character and effect are in no way changed by stigmatizing them as a "boycott" or labeling them with any other name. Even a boycott is not always unlawful.

In any event, however, the term "boycott" as used in legal phraseology has no application to the facts in this case. The term is defined by the authorities as follows:

"BOUVIER'S LAW DICTIONARY:

Boycott—An organized effort to exclude a person

from business relations with others by persuasion, intimidation and other acts which tend to violence, and thereby to coerce him, through fear of resulting injury, to submit to dictation in the management of his affairs."

"16 R. C. L., Page 477:

The term boycott, as generally understood, is a combination to harm one person by coercing others to harm him. As applied to labor union, 'boycott' is generally defined as an attempt, by arousing a fear of loss, to coerce others, against their will, to withhold from one denominated unfriendly to labor their beneficial business intercourse. A boycott has been defined to be a combination of several persons to cause a loss to a third person by causing others against their will to withdraw from him their beneficial business intercourse through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him; or an organization formed to exclude a person from business relations with others by persuasion, intimidation and other acts, which tend to violence, and thereby cause him through fear of resulting injury to submit to dictation in the management of his affairs."

"BLACK—LAW DICTIONARY:

Boycott—A conspiracy formed and induced directly or indirectly to prevent the carrying on of any lawful business, or to injure the business of any one by wrongfully preventing those who would be customers from buying anything or employing the representatives of said business by threats, intimidation or other forcible means."

"WORDS AND PHRASES:

> Boycott—A conspiracy to 'boycott' is a confederation, generally secret, of many persons, whose intent is to injure another by preventing any and all persons from doing business with him through fear of incurring the displeasure, persecution and avengeance of the conspirators."

The essential features of an unlawful boycott thus involve the following elements:

(1) An organized combination

(2) directed against specific persons or corporations

(3) with intent to do them injury or harm

(4) by inducing others to withdraw business intercourse

(5) through threats, violence or other coercive measures.

None of the tortious elements above-mentioned is present in the case at bar.

The respondents did not attempt to induce any third parties to withdraw business patronage or intercourse from the petitioner. All they said was that their own members would not work for the petitioner for less than a stipulated wage rate. Their object was not to hurt the petitioner but to benefit themselves. They did not resort to violence or intimidation and did not seek to exercise coercion upon persons dealing with the petitioner. They were purely passive in their refusal to accept the petitioner's terms of payment for their labor.

Under no stretch of imagination can the respondents' acts be held to constitute a "secondary boycott", which alone meets with the condemnation of the law.

The distinction between a so-called "primary boycott" and a "secondary boycott" has been lucidly stated by this Court in *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, in the following language:

> "The substance of the matters here complained of is an interference with complainant's interstate trade, intended to have coercive effect upon complainant and produced by what is commonly known as a 'secondary boycott', that is, a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it."

and even more fully by Clark in The Law of the Employment of Labor, pp. 289, 290, as follows:

> "A distinction is sometimes drawn between what are classed as primary and secondary boycotts. In the former, the action is directly against the offending employer, the members of the organization simply withholding their patronage as laborers or purchasers, and inducing their fellows to do the same. The mere withholding of patronage or refusal to trade is not unlawful, and the announcement or publication of such a purpose is within the rights of the persons agreeing together, even though it results in the injury of the person against whom the acts are directed. And it will follow that persons freely joining in such withholding of business intercourse will not by their acts inculpate either themselves or the orig-

inal actors. But such is not the usual course of the boycott; and indeed the definitions usually adopted do not cover such acts, but are applicable only to the second class, or the so-called secondary boycotts (sometimes called compound boycotts), which are generally understood to mean combinations to harm one person by coercing others to harm him."

Petitioner quotes at length from cases cited on pages 46, 47 and 48 of its brief to show that a combination of persons has a power for evil not possessed by an individual. This is not disputed. However, the fallacy of petitioner's position is its attempt to make the mere combination unlawful *per se*. The combinations condemned by the authorities on which petitioner relies are in each instance such as pursue unlawful ends or employ unlawful methods.

C.

THE RESPONDENTS' EFFORTS TO ENFORCE THE PROVISIONS OF SECTIONS 132 AND 133 OF THE BROTHERHOOD CONSTITUTION THROUGH ORGANIZED AND CONCERTED ACTION DO NOT CONSTITUTE AN UNLAWFUL COMBINATION.

The rule of law that workers may combine for lawful purposes although such combination may cause incidental injury to employers is based upon the recognition of the dignity of human labor.

The petitioner all through its brief has chosen to take the position that human labor is a commodity like any other article of commerce.

Thus it states on page 55:

> "If such a right is to be accorded to combinations of labor upon the theory that they have labor to sell for a price, and that must be the theory, then I submit that a similar privilege must be accorded to the sellers of any other product, and I see no reason, upon principle, why there may not be a combination of those dealing in hardware, or any other article of commerce, to sell at one price to a resident and at a lower price to a non-resident, or vice versa, and the districts may be as arbitrary as the combination of sellers desires to make them."

The appellant entirely overlooks the fact that human labor is an organic part of the very life and being of the worker and not an inanimate commodity to be bartered or sold at will.

Our courts have generally made a clear distinction between human labor and mere inanimate commodities and Congress has embodied the recognition of this fundamental distinction by statutory enactment, when in Section 6 of the Clayton Act it proclaimed that the labor of a human being is not a commodity or an article of commerce.

Proceeding on the basis of this assumed analogy between labor and commodities, the petitioner asserts the existence of a sort of property right in the employer to the labor of his workers, a "good will" in labor, and condemns the conduct of the respondent labor unions as an interference with this alleged property right of the petitioner.

The Courts have, of course, held that it is wrongful for a third party to interfere between an employer and

his workers and to induce a breach of agreement on the part of the latter. This rule has been applied to unions attempting to cause a strike among non-union employees from whom they hold no mandate. The fundamental distinction in this case is that the defendant unions were acting for themselves and their members under a provision of the Constitution voluntarily adopted by such members on a general vote and having the force of a contract between members *inter sese* and between them and their organization.

Respondent unions in this case acted as agents for the employees and with full authority from them. Thus Arthur P. Demaray, one of the petitioner's employees, testified that he obeyed the orders of Mr. Hoffman to quit "as he is our representative" (p. 49), and again that if he had known that under the rules of his union he was entitled to $10.50 a day he would have asked for such pay (p. 51).

Thomas Winsor, another of the petitioner's employees, likewise testified that he was ready to quit work as soon as he learned that the wages paid him were in violation of the union rule (p. 53), and so in substance did Joseph Housh, another of petitioner's employees (pp. 57, 58).

The petitioner's peculiar conceptions of the modern rights of labor are expressed on page 51 of its brief in the following language:

> "It is not yet necessary to pass upon the question whether or not a combination of individuals may be permitted to insist upon payment to them of a wage which is outrageous based upon no economic ground and destructive of employers as a whole. The time may be coming when *that*

question will have to be dealt with and, when it comes, there is no doubt but that the courts will deal with it by applying the *maxim sic utere*, etc."

The appellant is somewhat in error in his chronology. There was a time in the remote and dark past when the courts and other public authorities of Great Britain assumed to regulate the wages of workers, and even in the early days of our own republic a combination to raise wages was punishable as a criminal conspiracy.

> Philadelphia Cordwainer's Case (Sayre's Cases on Labor Law, p. 99).

This archaic concept has long yielded to the more modern and enlightened theory that an attempt to force labor to work at wages imposed by public authority would create a condition of involuntary servitude, in crass conflict with the fundamental principles of our Constitution.

The statement of the petitioner that every citizen of the United States has the inalienable right to acquire, possess and protect property, to follow any of the ordinary callings of life and to make contracts for that purpose, is undoubtedly sound. But two pertinent observations may be made on that point:

1. The Constitution guarantees the citizen in the right of possession of his own property and not of the property of another; it confers upon him the right to make contracts with other citizens but not to coerce the latter to submit to his terms. The petitioner in this case has the inalienable right to pursue its business and to make profits, but it has no right to force journeymen

painters to sell to it their labor, which is their property, on such terms as in its opinion are reasonable. It has the right to make contracts with respect to the wages to be paid by it, but it has no inalienable right to force such contracts on its own terms.

2. The workers likewise are citizens and enjoy equally with the employers the constitutional right to freely follow their callings and to make contracts with respect to their services. To hold that the workers have no right to attach their own conditions as to terms of compensation with respect to their labor, would be to deny them the very constitutional protection which the complainant herein invokes.

It may be perfectly true that the enforcement of the respondents' terms of employment as against the petitioner may result in damage to the latter. Concretely stated, that means that if the respondents enforce their demand upon petitioner, the latter will either have to secure better prices for its work in New Jersey, or forego some business in that State, or make less profits on the business it may be doing in it. There is nothing unusual or shocking in this situation. On the contrary, it is one that frequently confronts every business man about to make a contract of employment, purchase, sale or otherwise.

In *Whitehall* v. *Continental Tobacco Co.*, 125 Fed. 454, 461, the Court said:

> "The Tobacco Company and its employee were not required, like competitors engaged in public or quasi public service, to sell to all applicants who sought to buy, or to sell to all intending pur-

chasers at the same price. They had the right to select their customers, to sell and to refuse to sell to whomsoever they chose, and to fix different prices for sales of the same commodities to different persons."

The same principle applies in even a higher degree to the right of workers, acting singly or in concert, to sell their labor to different employers at different prices.

In *Lohse Patent Door Co.* v. *Fuelle,* 215 Mo. 421, 114 S. W. 997, 22 L. R. A. 407, the Court said:

> "At common law personal service—an occupation—could not be the subject of a monopoly. In discussing that question in the case of *State ex rel.* v. *Associated Press,* 159 Mo. loc. cit. 456, 60 S. W. 91, 104, 51 L. R. A. 151, 81 Am. St. Rep. 368, this Court used this language: 'But there is nothing here on which a monopoly can attach. The business is one of mere personal service—an occupation. Unless there is "property" to be affected with a public interest there is no basis laid for the fact or the charge of a monopoly' • • • We must therefore hold that the United Brotherhood of Carpenters and Joiners and their allied associations, whom the defendants represent, are not unlawful combinations made and entered into in restraint of trade, but are legal and highly laudable when confined within proper bounds."

See also:

Overland Pub. Co. v. *Union Lithograph Co.,* 207 Pac. 412;

Reihing v. *Local Union No. 52,* 109 A. 367;

Allis-Chalmers Co. v. *Iron Moulders' Union No. 125*, 150 Fed. 155;
Re Sweitzer, 162 Pac. 1134.

Prof. Williston in his work on Contracts, Vol. 3, Sec. 1655, expresses the following opinion:

> "In view of the modern social and economic attitude of large numbers of the community towards labor unions and the judicial expressions in certain cases involving, to be sure, allegations of criminal or tortious combinations, not the validity of a contract as such, *it seems probable that the ordinary principles governing contracts in restraint of trade would not now generally be applied to combinations of workmen.*"

D.

THE RESPONDENTS' EFFORTS TO ENFORCE THE RULE OF THE BROTHERHOOD DO NOT CONSTITUTE A COMBINATION IN RESTRAINT OF TRADE IN VIOLATION OF THE FEDERAL ANTI-TRUST LAWS.

Mr. Justice Smith of the Supreme Court of the District of Columbia, in his unreported opinion in the similar case of the *Barker Painting Company* v. *Brotherhood of Painters, Decorators and Paperhangers of America*, disposed of the petitioner's contention under this head in the following illuminating language:

> "It is urged, however, that the defendants in violation of the Sherman Act and anti-trust laws, combined and conspired to restrain trade and commerce in the District of Columbia and between the

States and the District of Columbia and between the District of Columbia and the States.

The terms trade and commerce as used in the Sherman Act mean interstate traffic, the interstate purchase, sale, or exchange, of commodities, the interstate transportation of persons and property and possibly the interstate transmission of messages. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203. Section 6 of the Clayton Act expressly provides that the labor of a human being is not a commodity or an article of commerce and that labor organizations shall not be construed to be illegal combinations or conspiracies in restraint of trade under anti-trust laws. Reading the Sherman Act and the Clayton Act together, it is apparent that the *Brotherhood of Painters, Local Union No. 368*, and the members thereof, cannot be regarded as a combination or conspiracy in restraint of trade or commerce."

And again:

"But, however, that may be, Section 6 of the Clayton Act specifically excludes the labor of human beings from the category of commodities or articles of commerce, and from that it necessarily results that defendants' collective rejection of employment for non-acceptance of the Brotherhood's 'higher wage' and 'shorter work' rules was not an interference with the purchase, sale, exchange, or transportation of commodities, and consequently was not a restraint of trade or commerce."

And:

"The plaintiff was not restrained by the defendants from the buying, selling, exchanging, or

transportation of goods, wares or merchandise, and no such restraint could be exercised inasmuch as plaintiff's business was not of that kind. The business of the Barker Painting and Decorating Company is painting and decorating, not merchandising or the transportation of persons or property, and therefore its business is not trade or commerce within the meaning of the Sherman Act. The plaintiff contracts to paint and decorate and its contracts are governed by the law of the place in which they are made or in which they are to be performed. Such contracts are not commodities and 'are not interstate transactions though the parties may be domiciled in different states'. *Paul* v. *Virginia*, 8 Wall. 168, at page 183."

The opinion of Mr. Justice Smith is fully in accord with the expressed attitude of this Court in similar situations.

U. S. Leather Workers International Union v. *Herker*, 265 U. S. 457, was a case of a strike accompanied by illegal picketing and intimidation of workers, which had the effect of preventing the continued manufacture of articles destined for interstate commerce, and of actually stopping the shipment of some of such articles to other states. The action was brought in the courts of the United States under the Federal Anti-Trust Law. This Court after an elaborate review of the legal principles involved held that the action was not maintainable, saying:

"The record is entirely without evidence or circumstances to show that the defendants in their conspiracy to deprive the complainants of their workers were thus directing their scheme against interstate commerce. It is true that they were, in this labor controversy, hoping that the loss of

> business in selling goods would furnish a motive to the complainants to yield to demands in respect to the terms of employment; but they did nothing which in any way directly interfered with the interstate transportation or sales of the complainant's product."

Industrial Association v. *United States,* 268 U. S. 64, was an action to restrain the defendant, an association of building contractors of the City of San Francisco, from carrying out a scheme of the association by which it was sought to exclude union labor from the building operations of San Francisco by refusing to sell to employers of such labor certain necessary building materials.

The courts below granted an injunction, holding that the action of the defendant constituted a combination in restraint of interstate commerce in violation of the Anti-Trust Act.

We quote the following significant portions of the opinion of this Court reversing the judgment of the Court below:

> "The thing aimed at and sought to be obtained was not in restraint of the interstate sale or shipment of commodities, but was a purely local matter, namely regulation of building operations within a limited local area, so as to prevent their domination by labor unions. Interstate commerce, indeed commerce of any description, was not the object of attack, 'for the sake of which the several acts and courses of conduct were done and adopted'. *Swift & Co.* v. *U. S.,* 196 U. S. 375, 397. * * *
>
> We concur with the dissenting Judge in the Circuit Court of Appeals when, in speaking of the conclusion of the majority, he said: '* * *.'

> The alleged conspiracy and the acts here complained of, spent their intended and direct force on a local situation—for building is as essentially local as mining, manufacturing or growing crops, and, if by a growing diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fruitious consequence so remote and indirect as plainly to cause it to fall outside of the reach of the Sherman Act.
>
> To extend a statute intended to reach and suppress real interferences with the free flow of commerce among the states, to a situation so equivocal and so lacking in substance, would cast doubt upon the serious purpose with which it was framed."

In *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, the Court dealt with a strike against certain coal mines in the State of Arkansas which shipped their products to other states. This Court in reversing a judgment in favor of the plaintiff said:

> "If it be said that what District No. 21 (one of the defendants) feared was that if Bache (one of the plaintiffs) were successful, the defection among union operators would spread and ultimately the whole District field of District No. 21 in Arkansas, Oklahoma and Texas would become non-union, and interstate commerce would then be substantially affected, it may be answered that this is remote and no statement or circumstance appears in the record from which it can be inferred that the participants in the local strike had such a possibility in mind or thought they were thus protecting union operators in a control or monopoly

of interstate commerce. The result of our consideration of the entire record is that there was no evidence submitted to the jury upon which they properly could find that the outrages, felonies and murders of District 21 and its companions in crime were committed by them in a conspiracy to restrain or monopolize interstate commerce."

POINT IV.

The Construction of the New Jersey Statute entitled "An Act Relative to Persons Combining and Encouraging Other Persons to Combine" (P. L. 1883, p. 36, 3 Comp. St. of N. J., p. 3051) is not involved in this case and the decision of the Court below does not so construe the said statute as to make it offensive to the provisions of the Fourteenth Amendment.

The statute in question reads as follows:

> "That it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise, or encourage by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any person or persons or corporation."

The petitioner seems to argue that the decision of the Circuit Court of Appeals held directly or by implication that although the acts of the respondents complained of would be unlawful in themselves, they were legalized by the statute above quoted, and that such

alleged construction of the said statute by the Circuit Court of Appeals would render it offensive to the provisions of the Fourteenth Amendment.

In the case directly reviewed here the Circuit Court of Appeals did not discuss the merits of the case beyond referring to and re-affirming its position in the earlier case, *Barker Painting Company* v. *Brotherhood*, 15 Fed. (2nd) 16.

The opinion of the District Court which was affirmed by the Circuit Court of Appeals quotes with approval certain portions of the opinion of the New Jersey Court of Errors and Appeals in the case of *New Jersey Painting Company* v. *Brotherhood* (96 N. J. E. 632), which among other things refers to the New Jersey statute above quoted and states that a previous expression of the Court in *Jonas Glass Co.* v. *Glass Bottle Blowers Asso.*, 77 N. J. Eq. 219, that the effect of the said statute was to merely render the combination therein described no longer indictable, was mere dictum.

But neither the District Court in this case nor the New Jersey Court of Errors and Appeals in the *New Jersey Painting Company* case based the decision upon the said statute. In both cases the courts examined the facts on the merits and held that the acts complained of were not unlawful and that the combination for the accomplishment of such acts was lawful *per se* even without the aid of the special New Jersey statute.

In the earlier case of *Barker Painting Company* v. *Brotherhood*, decided by the Circuit Court of Appeals for the Third Circuit (15 Fed. (2nd) 16), upon whose authority the judgment in the present case was affirmed

by the same Court, the case was disposed of without reference to the New Jersey statute.

The construction of that statute by the New Jersey Court of Errors and Appeals or by the United States District Court for the District of New Jersey or by the Circuit Court of Appeals for the Third Circuit is thus in no way involved in this review.

But even if this Court were called upon to pass on the question, there is nothing in the construction of the statute under consideration by the courts mentioned to render the same offensive as against the Fourteenth Amendment.

The petitioner seeks to draw an analogy between the alleged construction of the New Jersey statute by the courts above mentioned and the construction which the courts of Arizona placed upon a somewhat similar though broader statute and which this Court rejected in *Truax* v. *Corrigan*, 257 U. S. 312.

It is respectfully submitted that there is no analogy whatsoever between the two cases.

In *Truax* v. *Corrigan*, the defendants carried on a boycott against the plaintiff by picketing, using abusive language, circulating libelous statements and making threats against him, the object of the campaign being to exercise coercion "over strangers to the original controversy".

This Court held that such acts were inherently illegal; that they were not intended to be legalized by the Arizona statute, and if they were that the statute would run counter to the provisions of the Fourteenth Amendment.

In the case at bar the trial Court has found that the

record herein is barren of any showing of intimidation, violence or disorder of any sort on the part of those who ceased work, or of those representatives of the unions at whose instance the demand for higher wages was made.

There was no attempt to exercise any coercion upon third parties.

The respondents on this point quote from the opinion of Judge Runyon of the District Court for the District of New Jersey in this case.

> "The case of *Truax* v. *Corrigan*, 257 U. S., p. 312, is strongly urged in support of the alleged illegality of the rule, both as to its provisions and its operation, but as I read that case, it is far removed from the instant one.
>
> In that case the distinct object of the concerted action was to injure the plaintiff's business in order that he might be forced to meet the defendant's demands, and the means adopted to cause that loss were little short of scandalous, consisting in part, as they did, of virulent attacks upon the character, not only of the plaintiff and his business, but also of those who patronized the plaintiff. The effect of this destructive campaign was ruinous to the plaintiff's business, and the Supreme Court holds that a state statute which in practice denies legal relief in all forms, or, at the least, equitable or injunctive relief, under such circumstances, is defective, in that it fails to afford all the equal protection of the laws. The inequality in the operation of the statute was based upon the fact that it favored plaintiff's ex-employees-parties whose relationship with plaintiff had in reality ceased—in exempting them as parties to a labor dispute from the operation of a law made applicable to all others

who might seek to destroy plaintiff's business and property, and in so doing, proceed exactly as these ex-employees did."

It is moreover quite obvious from a superficial reading of Sec. 1 of the 14th Amendment that its application is limited to State Legislation and not to private contracts.

In *United States* v. *Norris*, 125 Fed. 322, the Court said:

"It is now well settled that these two amendments (13th and 14th) have reference solely to actions of the state, and not to any action of private individuals, although it is immaterial whether the state acts by its legislative, executive or judicial authority," citing *U. S.* v. *Reese*, 92 U. S. 214; *U. S.* v. *Cruikshank*, 92 U. S. 542; *Virginia* v. *Rives*, 100 U. S. 313; *Ex parte Virginia*, 100 U. S. 339; *Civil Rights Cases*, 109 U. S. 3; *U. S.* v. *Harris*, 106 U. S. 629; *James* v. *Bauman*, 109 U. S. 127.

Similarly in *Marten* v. *Halbrook*, 157 Fed. Rep. 716:

"The provisions of the constitution and laws of the United States, the protection of which is sought here to invoke do not relate to or include such merely private wrongs or transgressions as those complained of. The inhibition of those enactments are against the state, its officers or agents, and not against the acts of merely private individuals acting as such."

In the *Civil Rights Cases*, 109 U. S. 3, Mr. Justice Bradley, in a complete and masterly analysis of the subject, said:

"The first section of the Fourteenth Amend-

ment (which is the one relied on) after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States. It declares that:

'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

It is state action of a particular character that is prohibited. Individual invasion of individual rights, is not the subject matter of the amendment."

and again:

"It must appear as well by allegation, as proof at the trial, that the constitution has been violated *by the action of the state legislature.* Some obnoxious law passed, as that might be passed, is necessarily to be assumed in order to lay the foundation of any federal remedy in the case; and for the very sufficient reason, that the constitutional prohibition is against *state laws* impairing the obligation of contracts."

In *United States* v. *Cruikshank et al.*, 92 U. S. 542, 554, Mr. Chief Justice Waite lays down the doctrine in the following language:

"The Fourteenth Amendment prohibits *a State* from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another."

And finally in *Virginia* v. *Rives*, 100 U. S. 313, 318:

> "The provisions of the Fourteenth Amendment of the Constitution we have quoted, all have reference to State action exclusively, and not to any action of private individuals."

But even if the provision of the Brotherhood Constitution under discussion is to be given the effect of a statute passed by a State Legislature, it does not offend against the Fourteenth Amendment of the United States Constitution because the well established rule is that State Legislation does not constitute a denial of the equal protection of the laws so long as all persons subject to it are treated alike under similar circumstances and conditions in respect to the privileges conferred and to the liabilities imposed, and that a statute is not void as denying such equal protection merely because it applies only to certain persons or classes of persons.

> "Wherever the law operates alike on all persons and property, similarly situated, equal protection cannot be said to be denied."
>
> *Walston* v. *Nevin*, 128 U. S. 578.
>
> "The classification of subjects of such Regulative legislation, so long as such classification has a reasonable basis, and is not merely arbitrary selection without real difference between the subjects included and those omitted from the law, does not deny to the citizens the equal protection of the laws."
>
> *Griffith* v. *Connecticut*, 218 U. S. 563.
>
> "Due process of law and equal protection of the laws are secured if the law operates upon all

alike and do not subject the individual to an arbitrary exercise of the powers of government."

Miller v. *Mayor of City of Birmingham*, 151 Ala. 469.

"The plaintiff was not denied the equal protection of the laws contrary to the Fourteenth Amendment of the Federal Constitution, which merely requires that all persons shall be treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed. A statute does not deny to a party the equal protection of the laws unless he is treated differently by it from others in the same condition."

Price v. *City of Elgin*, 257 Ill. 63.

"As we have no provision in our State Constitution securing in express terms the equal protection of the laws, the question thus raised is a question arising solely under the Fourteenth Amendment to the Federal Constitution. The rule in question of this kind is now so well settled by the decisions of the United States Supreme Court that no extended discussion is required. The rule is that, if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection."

West v. *City of Asbury Park*, 99 Atl. 190.

The rule of the Brotherhood is not aimed at and does not apply to the petitioner in this case alone and does not seek to establish arbitrary discriminations between one person and another. It applies to all employing painters within the whole territory of the United States who

undertake to do work outside of their home districts, and strikes them all alike.

Article 4, Sec. 2, of the Constitution of the United States, likewise is limited to state action and does not control the conduct of individuals.

In *Williams* v. *Bruffy*, 96 U. S. 176, 183, Mr. Justice Field said:

> "This provision has been held in repeated adjudications of this court, to prohibit discriminating legislation by one State against the citizens of another State, and to secure to them the equal protection of its laws, and the same freedom possessed by its own citizens in the acquisition and enjoyment of property. *Corfield* v. *Coryell*, 4 Wash. C. C. 371; *Ward* v. *Maryland*, 12 Wall. 418; *Paul* v. *Virginia*, 8 Wall. 168."

Similarly it was said in *Le Grand* v. *U. S.*, 12 Fed. 577, 583:

> "I refer to Section 2 of Article 4, which declares the citizens of each state should be entitled to all the privileges and immunities of citizens of the several states. But this section, like the Fourteenth Amendment, is directed against state action."

The same view was taken in *United States* v. *Harris*, 106 U. S. 629, 643:

> "But this section (the Court had referred to Section 2 of Article 4) like the Fourteenth Amendment, is directed against State action. Its object is to place the citizens of each State upon the

> same footing with citizens of other States and inhibit discriminative legislation against them by other States. *Paul* v. *Virginia*, 8 Wall. 168."

A more recent statement of the principle is found in *Maxwell* v. *Bugbee*, 250 U. S. 525, 537:

> "The provision quoted from Art. IV of the Constitution was intended to prevent discrimination by the several States against citizens of other States in respect of the fundamental privileges of citizenship."

In *U. S.* v. *Wheeler*, 254 U. S. 281, Chief Justice White held that the clause is intended to protect the privileges and immunities of citizens of each state against state action and is not violated by a wrongful prevention by an individual of the enjoyment of such privilege by a citizen of another state.

That the constitutional provision does not confer a right of protection against the acts of individuals, but is aimed at the hostile action of the states is also asserted in

> *Corfield* v. *Coryell*, 4 Wash. C. C. 381;
> *Slaughter-House Cases*, 16 Wall. 36;
> *Hodges* v. *United States*, 203 U. S. 1.

POINT V.

The cases in which the precise question was considered by other courts.

The question of the lawfulness of Sections 132 and 133 of the Constitution of the Brotherhood of Painters, Decorators and Paperhangers of America, which is in-

volved in this appeal, has been litigated and passed upon by many courts within the last five or six years.

The respondents respectfully submit a brief review of all such cases in chronological order as far as they could ascertain them.

The first of such cases was that of the *New Jersey Painting Company* v. *Local No. 26 et al.*, 122 Atl. Rep. 622.

That action arose over a difference between the wage rates in New York, N. Y., and in Newark, New Jersey.

A preliminary injunction was obtained, and such injunction was made permanent upon trial in an elaborate opinion by Vice-Chancellor Backes. An appeal was taken by the defendants from the decree of the said Vice-Chancellor to the New Jersey Court of Errors and Appeals, which reversed the lower Court, holding that the provisions of Sections 132 and 133 of the Brotherhood Constitution were not unlawful.

The Court said *inter alia*:

> "The mere combination of action is not the element which gives an illegal character to the act. It is the illegality of the purpose to be accomplished, or the illegal means used separately or in furtherance of the purpose, which makes the act illegal. *Lindsay & Company* v. *Montana Federation of Labor*, 37 Mont. 264, 273; 18 L. R. A. N. S. 707. *Vegelahn* v. *Guntner*, 167 Mass. 92, 98; 16 L. R. A. N. S., note page 85.
>
> The rule adopted and promulgated by the defendants is not aimed at and does not apply to the complainant solely. It does not seek to establish arbitrary discriminations between one person

or corporation and another. It applies to all employing painters within the whole territory of the United States, who undertake to do work outside of their home districts. It applies to all alike, automatically, who come within the prescribed rule. Cooperation in some form now seems to be an economic necessity, in all business, trades and occupations, throughout the United States, if not, throughout the entire world.

Nearly all the cases in this country quite uniformly hold, and the complainant seems to concede, that the union may arbitrarily fix a uniform scale of wages applicable to all its members and strike to enforce its demands, *i. e.*, either to maintain or advance a scale of wages; and the strike will not be interfered with by the courts, if it is lawfully carried on. *Bossert* v. *Dhuy*, 221 N. Y. 342. But the argument by the complainant followed by the learned Vice-Chancellor in this case seems to be based upon the idea, that the union cannot in good faith frame or adopt a rule providing for a sliding scale of wages, to fit ostensibly the varying local economic conditions throughout the United States, which in effect does discriminate against some employers, as a class, in the matter of wages to be paid. It seems to be based upon the ground that such regulations create an unfair restraint of trade. The attack is aimed not at the combination but at its effect upon the employer. This is unsound, both legally and economically. In the last analysis, the prime object of the rule attacked is to establish a standard of wages. It is hardly necessary to enter into any extended discussion, pointing out that in law or by analogy Article 4, Sec. 2 and Article 14, Sec. 1 of the Constitution of the United States,

are not applicable to private contracts. These sections are directed against state action only: *United States* v. *Harris*, 106 U. S. 643. Economically, the conclusion reached by the lower Court confuses the possible or probable effect of the defendant's action upon the employers with the defendant's rights. The law gives the defendants a right to sell their labor to whom they please, when and under such conditions as they may fix, individually or in combination. They may make rules and regulations passed in good faith providing for what they deem to be an economic advantage to themselves. If in the enforcement of such rules and regulations, they violate no law, but act solely for the declared purpose, the courts ought not and cannot legally enjoin them from such concerted action, simply, because, such action may affect some employers. How can it be said that such rules and regulations create an unfair restraint of trade? If the law gives the workers such rights, it must protect them in their employment. They cannot be enjoined from their use or interfered with by the courts. Employers have no vested interest in the labor of workers. We think the defendants, by the terms of the Statute of 1883, both its letter and spirit are within its protection. They are also within the protection of the law as declared in the cases cited. The cases, in which concerted action on the part of a body of workers has been held unlawful, have invariably been such, in which either the object sought to be attained had little or no bearing on the interest of the workers or in which the methods employed by them were in themselves unlawful."

The next suit of similar character was that of the *Barker Painting Company* v. *Brotherhood of Painters*,

Decorators & Paperhangers of America et al., in the Supreme Court of the District of Columbia.

In that suit a preliminary injunction was issued on April 9, 1924. On trial the injunction was dissolved and the bill dismissed by Associate Justice Smith in an elaborate opinion. On appeal to the Court of Appeals of the District of Columbia the said Court affirmed the judgment dismissing the bill (23 Fed. (2nd) 743).

The respondents quote the following portions of the unreported opinion of Justice Smith:

> "A conspiracy, unless otherwise defined by statute, is a combination of two or more persons by concerted action to accomplish a *criminal or unlawful purpose* or to accomplish by *criminal or unlawful means* a purpose not in itself criminal or unlawful. *Pettibone* v. *United States,* 148 U. S. 197, 203. Under that definition the defendants are not subject to the charge of conspiracy unless they combined to achieve an illegal purpose or sought by concerted action to accomplish a lawful objective by criminal or unlawful means.
>
> The purpose of labor unions to secure to their members higher wages and shorter hours of daily labor or less days of work for the week or month, is not unlawful. *Adair* v. *United States,* 208 U. S. 161, 174. Laborers and artisans individually have the indisputable right in this country to say upon what terms they will accept employment and the employer on his part is free to accept or reject the terms demanded for service. That which is the right of one laborer or artisan is the right of every other laborer or artisan, and if a thousand workers present without duress or threat a united demand that a certain wage be paid to each of

them for 8 hours of daily labor during a 5 or 5½ day week, they are no more engaged in an unlawful enterprise than is the individual laborer or artisan who makes the same terms a condition for his acceptance of employment.

Bad faith, an unlawful design, or unlawful methods to accomplish by concerted action a lawful end are the characteristics of every conspiracy, not otherwise defined by statute. Laborers or artisans who combine to demand a wage which will raise their standard of living or who combine to stabilize local wages or to maintain the local supply of labor, or to make less tempting the migration of labor to places having a lower cost of living, cannot be regarded as acting in bad faith, or with evil intentions, or for the consummation of an illegal purpose.

Union terms of service may be economically unsound and may strip the farm of labor by concentrating the workers in cities and towns. Such terms may advance the cost of living to the working man and everybody else, many times the increase in wages and produce complications immeasureably worse than the evils sought to be remedied. Nevertheless, just so long as collective terms are operative under like conditions and similar circumstances as to all localities and all employers, it cannot be said that combined or concerted action for higher wages and less work time is discriminatory or is designed for an unlawful or ulterior purpose. The collective fixing of a scale of wages and hours of labor may not conform to sound economics, but to make it illegal it must be in violation of governmental laws in force and effect.

As the defendants had the legal right to pre-

scribe upon what terms they would accept employment from all employers in all localities, and as they did not seek to compel the plaintiff by violence, threats, or any other unlawful means to agree to such terms, their concerted refusal to work unless the plaintiff paid the wages for the working time provided by the constitution of the Brotherhood, can not be regarded as a common law conspiracy."

In *Hass* v. *Local Union No. 17 of the Brotherhood*, 300 Fed. 894, the Court granted an injunction relying, as above set forth, on the opinion of Vice-Chancellor Backes in the case of *New Jersey Painting Company* v. *The Brotherhood*, which was subsequently reversed, and the preliminary injunction in the Supreme Court of the District of Columbia subsequently set aside.

In *George A. Douglas & Bros., Inc.*, v. *Clarence Mallette et al.*, a similar suit based upon the alleged unlawfulness of Sections 132 and 133 of the Brotherhood Constitution was dismissed, largely on the authority of the opinion of the New Jersey Court of Errors and Appeals in the *New Jersey Painting Company* case.

The case of *Marshall* v. *The Brotherhood* was brought in the Court of Common Pleas No. 1 of Philadelphia County in the month of March, 1925. It involved the same question.

After final hearing upon the bill, answer and replication, the Court dismissed the bill in an elaborate opinion, largely adopting the reasoning of the New Jersey Court of Errors and Appeals.

The case of *Barker Painting Company* v. *Brotherhood*, in the United States District Court for the Eastern

District of Pennsylvania, was instituted in the month of December, 1925.

The suit was dismissed on the merits upon trial and the decree of dismissal was affirmed by this Court.

In the instant case, the United States District Court for the Eastern District of New Jersey dismissed the appeal on the merits on April 14, 1926.

Counsel quotes the following illuminating statement from the opinion of Judge Runyon which is printed in full in the Transcript of Record herein (p. 28):

> "Counsel for the petitioner in the instant case contends that the combination itself constitutes the offense complained of; that while each individual member of the union, if acting alone, had and has an indisputable right to stop work, and all because his employer, coming from a higher jurisdiction wherein higher wages are paid, refuses to pay him that higher rate, yet the concerted action of the same individuals, seeking the same advantage for the same cause, and producing the same effect, constitutes, of itself, an offense, in that such combination takes the situation out of the domain of the privilege which is each man's inalienable right, and into the domain of relative rights wherein the employer, the workers, and the public are parties.
>
> If the entire transaction, as instituted by each individual member and carried to the point of actual cessation of work, is neither inherently bad nor constitutes an offense; if such transaction, duplicated a hundred times by that number of individuals, constitutes no such offense, it follows that the offense herein—if any there be—lies neither in the ultimatum of the individual worker,

nor in his withdrawal from his work, nor in the hundred other duplications of such procedure; nor in having, through such means, brought the employer's business to a standstill—a disastrous standstill, perhaps—but must arise from the fact that these individuals have not acted, each for himself, but collectively, and as members of an organization.

And even so, the trend of modern economic usage, both as practiced and as given expression in the courts, is increasingly against regarding combinations among laborers as unlawful *per se*, but narrows its condemnation to those combinations which are formed for the purpose of effecting an unlawful object, or the doing of a distinct injury to one against whom the activities of the combination may be directed.

Courts differ as to what constitutes a boycott that may be enjoined. All hold that there must be a conspiracy causing irreparable damage to the business or property of the complainant.

Gompers v. *Bucks Stove and Range Co.*, 221 U. S. p. 437.

Assuming, therefore, that a combination is not unlawful *per se*, inquiry must be directed to the ascertainment of the objects of the present combination, and the mode and method adopted in putting such objects into practice, whether or not they be lawful; and also to the effect thereby produced.

There are divers objects sought in the organization of labor; the betterment of general working conditions, the adoption of proper safety appliances, workmen's compensation in cases of injury and death, hours of labor, etc., etc. And by no

means the least of these objects is that one which deals with wages.

A reading of the rule adopted at Dallas furnishes ample proof that, in the minds of those who framed its terms, there was one main plan—that of increasing wages under certain conditions therein named. Whatever dispute there may be regarding these conditions, the fact must remain that there was in contemplation their utilization as a basis for wage increase.

By itself, the quest for increased wages is a lawful object; and, therefore, if in the present case, in connection with the object of securing increased wages there appears that which is unlawful, it is to be found in one or more of the following factors; either in the residential feature of the rule, or in the methods adopted in the attainment of the object, or in the effect which such attainment has produced."

POINT VI.

It is respectfully submitted that the decision of the Circuit Court of Appeals should be affirmed, with costs.

Dated April 21, 1930.

MORRIS HILLQUIT,
Solicitor for Respondents.